

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	File Number EB-03-KC-001
)	
Johnson Enterprises, Inc.)	NAL/Acct. No 200332560016
Licensee of KLEY(AM))	
Wellington, Kansas)	FRN 0006-1509-65
)	

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Released: April 3, 2003

By the Enforcement Bureau, Kansas City Office:

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture ("NAL"), we find Johnson Enterprises, Inc. ("Johnson"), licensee of broadcast radio station KLEY(AM), Wellington, Kansas, apparently liable for a forfeiture in the amount of six thousand dollars (\$6,000) for willful and repeated violation of Section 73.1745(a) of the Commission's Rules ("Rules").¹ Specifically, we find Johnson Enterprises, Inc. apparently liable for operating station KLEY with full daytime power at night.

II. BACKGROUND

2. On January 6, 2003, the Commission's Enforcement Bureau, Kansas City Office ("Kansas City Office") received a confidential complaint specifying that station KLEY had been operating at night with full daytime power while carrying Nebraska University football games and other local sporting events. The complaint indicated the station appeared to be attempting to cover Wichita, Kansas with its broadcast signal and questioned how this could occur with only 1 watt of power authorized at night. Wichita is approximately 30 miles from the KLEY location in Wellington. KLEY's station license authorizes operation with 250 watts of power daytime and 1 watt nighttime.

3. During the period of January 10-21, 2003, the Kansas City Office monitored the signal strength level of station KLEY. The monitoring showed that KLEY remained at daytime power during nighttime hours on January 10 through January 13, 2003.

4. On January 30, 2003, an agent of the Kansas City Office inspected radio station KLEY, accompanied by owner and general manager Gordon Johnson and chief operator Vernon Napier. The inspection determined the following:

- a) Mr. Johnson stated that Johnson had entered into a written contract to carry Nebraska University football games on KLEY during the 2002 football season "in their entirety."

¹ 47 C.F.R. § 73.1745(a).

Mr. Johnson produced a contract with the Kansas Cornhusker Club of Wichita, Kansas.

- b) Mr. Johnson stated that on August 24, 2002, beginning at 6:45 p.m. and lasting approximately 3 hours, station KLEY aired a football game between Arizona State University and Nebraska University while operating with full daytime power of 250 watts. The KLEY authorization specifies sunset time for the month of August is 7:30 p.m. Mr. Johnson stated that the station utilized an automatic timer to switch the transmitter between daytime and nighttime power levels and that, on August 24, 2002, the operator used the manual override to operate the transmitter with daytime power during nighttime hours.
- c) Mr. Johnson stated that on September 14, 2002, beginning at 7:00 p.m. and lasting approximately 3 hours, station KLEY aired a football game between Penn State and Nebraska University while operating with full daytime power of 250 watts. The KLEY authorization specifies sunset time for the month of September is 6:45 p.m. Mr. Johnson stated that, as on August 24, 2002, the operator manually overrode the automatic timer in order to operate the transmitter with daytime power during nighttime hours.
- d) Mr. Johnson stated that he observed the station operating on daytime power after sunset on the evening of January 28, 2003, but allowed the operation to continue through the next day. Mr. Napier stated that when he arrived at the station before sunrise on the morning of January 29, 2003, the station was operating at daytime power.
- e) Mr. Johnson stated he was unaware of the daytime power operation during nighttime hours on January 10-13, 2003, as observed by the Kansas City Office, but did not refute the operation.
- f) KLEY maintains no human operator in charge of nighttime transmitter and no automated monitoring devices are installed to monitor the transmitter for out-of-tolerance conditions.

III. DISCUSSION

5. Section 73.1745(a) requires that no broadcast station shall operate at times, or with modes or power, other than those specified and made a part of the license. The terms of the KLEY station authorization specifies that the station may operate from local sunrise to local sunset with a power of 250 watts, and authorizes nighttime operation from midnight to local sunrise and from sunset to midnight each day with a power of 1 watt. KLEY operated its station with daytime power during nighttime hours on the following dates: August 24, 2002, September 14, 2002, January 10, 2003, January 11, 2003, January 12, 2003, January 13, 2003, January 28, 2003, and January 29, 2003.

6. Based on the evidence before us, we find Johnson willfully² and repeatedly³ violated Section 73.1745(a) of the Rules and the terms of the KLEY station authorization by failing to reduce power to 1 watt during nighttime operation of station KLEY on seven separate dates.

7. Pursuant to Section 1.80(b)(4) of the Rules,⁴ the base forfeiture amount for overpower operation is \$4,000. In assessing the monetary forfeiture amount, we must also take into account the statutory factors set forth in Section 503(b)(2)(D) of the Communications Act of 1934, as amended (“Act”), which include the nature, circumstances, extent, and gravity of the violation, and with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require.⁵ With regards to the overpower operation, the evidence shows that Johnson knowingly operated overpower at night because, on at least two occasions, a Johnson employee intentionally bypassed the transmitter’s automatic timer preventing the required reduction of power at night. Based on these circumstances, an upwards adjustment of the base forfeiture amount from \$4,000 to \$6,000 is warranted. Considering the entire record and applying the factors listed above, this case warrants a \$6,000 forfeiture.

² Section 312(f)(1) of the Act, 47 U.S.C. § 312(f)(1), which applies to violations for which forfeitures are assessed under Section 503(b) of the Act, provides that “[t]he term ‘willful’, when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act” See *Southern California Broadcasting Co.*, 6 FCC Rcd 4387-88 (1991).

³ The term “repeated,” when used with reference to the commission or omission of any act, “means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day.” 47 U.S.C. § 312(f)(2).

⁴ 47 C.F.R. § 1.80(b)(4).

⁵ 47 U.S.C. § 503(b)(2)(D).

IV. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED THAT, pursuant to Section 503(b) of the Act,⁶ and Sections 0.111, 0.311 and 1.80 of the Rules,⁷ Johnson Enterprises, Inc. is hereby NOTIFIED of this APPARENT LIABILITY FOR A FORFEITURE in the amount of six thousand dollars (\$6,000) for willful and repeated violation of Section 73.1745(a) of the Rules and the terms of the KLEY station authorization for operating station KLEY overpower at night on seven separate dates.

9. IT IS FURTHER ORDERED THAT, pursuant to Section 1.80 of the Rules, within thirty days of the release date of this NAL, Johnson Enterprises, Inc. SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

10. Payment of the forfeiture may be made by mailing a check or similar instrument, payable to the order of the Federal Communications Commission, to the Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. The payment should note the NAL/Acct. No. and FRN referenced above. Requests for payment of the full amount of this NAL under an installment plan should be sent to: Chief, Revenue and Receivables Operations Group, 445 12th Street, S.W., Washington, D.C. 20554.⁸

11. The response, if any, must be mailed to Federal Communications Commission, Office of the Secretary, 445 12th Street SW, Washington DC 20554, Attn: Enforcement Bureau-Technical & Public Safety Division and MUST INCLUDE THE NAL/Acct. No. referenced above.

12. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices ("GAAP"); or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

13. Under the Small Business Paperwork Relief Act of 2002, Pub L. No. 107-198, 116 Stat. 729 (June 28, 2002), the FCC is engaged in a two-year tracking process regarding the size of entities involved in forfeitures. If you qualify as a small entity and if you wish to be treated as a small entity for tracking purposes, please so certify to us within thirty (30) days of this NAL, either in your response to the NAL or in a separate filing to be sent to the Technical & Public Safety Division. Your certification should indicate whether you, including your parent entity and its subsidiaries, meet one of the definitions set forth in the list provided by the FCC's Office of Communications Business Opportunities (OCBO) set forth in Attachment A of this Notice of Apparent Liability. This information will be used for tracking purposes only. Your response or failure to respond to this question will have no effect on your rights and responsibilities pursuant to Section 503(b) of the Communications Act. If you have questions regarding any of the information contained in Attachment A, please contact OCBO at (202) 418-0990.

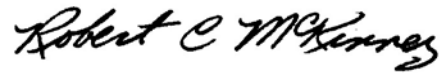
⁶ 47 U.S.C. § 503(b).

⁷ 47 C.F.R. §§ 0.111, 0.311, 1.80.

⁸ See 47 C.F.R. § 1.1914.

14. IT IS FURTHER ORDERED THAT a copy of this NAL shall be sent by regular mail and Certified Mail Return Receipt Requested to Johnson Enterprises, Inc., P.O. Box 707, Wellington, Kansas 67152.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in black ink, reading "Robert C. McKinney". The signature is written in a cursive style with a large, stylized "R" and "M".

Robert C. McKinney
Kansas City Office, Enforcement Bureau

Attachment